UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CLAREX LIMITED and BETAX LIMITED,

Plaintiffs,

v. 12 CV 7908(GHW)

NATIXIS SECURITIES AMERICAS, LLC, et al., Trial

Defendants.

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New York, N.Y.
May 27, 2014
9:20 a.m.

Before:

HON. GREGORY H. WOODS

District Judge

APPEARANCES

AKERMAN LLP
Attorneys for Plaintiffs
BY: MARTIN DOMB
BENJAMIN JOELSON

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(Case called; jury not present)

THE COURT: Good morning. Thank you all for being here. We expect our jury to arrive around 10 a.m. This gives us an opportunity to take a few moments to discuss some preliminary matters.

The first thing I will mention is the acoustics in this room, as you can tell, are not great. You should use your microphones when you are speaking for the benefit of the court reporter and the jurors, and for my benefit. Please, if you need to move the microphones to make sure that you are easily heard, do so. Similarly, please let me know if you think there is an issue with the witness and the microphone. My deputy, Mr. Daniels, will help adjust it to make sure that the acoustics in this room are as little a problem as possible.

A couple of housekeeping matters before I address any questions that the parties may have. First, we have already discussed duration of openings. I think I said that an opening of up to 30 minutes will be fine. Both of you are experienced counsel. I know that you will stay within bounds with respect to your openings, so I won't address that. I will simply ask you to stay within the 30 minutes that we discussed earlier.

Second, again housekeeping, you don't need to ask me if you want to approach the witness. Please feel free to approach the witness.

Similarly, with respect to objections, please no

argument in the course of an objection. I don't mind if you state the basis for your objection together with the fact of an objection: Objection, hearsay; objection, authenticity, whatever the basis is. I will appreciate that. If you can time the objections correctly so at the end of a question, not during the witness's testimony in response, I would also appreciate that, to make sure that the proceedings are as streamlined as possible.

Can I ask, before the jurors come in, briefly for you, Mr. Domb, do we have an estimate of when you think we may get to Ms. Kase's testimony and whether or not we might have to take Friday off? It goes to what I am going to tell the jurors in terms of their time here.

MR. DOMB: Your Honor, over the weekend we decided not to call Ms. Kase, and yesterday we informed opposing counsel. We also decided not to call Mr. Edward Farah, and also informed opposing counsel. So that is not an issue.

THE COURT: Thank you very much. I appreciate that. We will intend to proceed through Friday.

With respect to exhibits, I should thank both sides for working as hard as you have to agree on exhibits and their admissibility beforehand. I very much appreciate that. I'm sure the jurors will very much appreciate that, because the presentation will be much more fluid.

There are a couple of issues that I reserved on that

are addressed in your letters, which I can take up now, before the jury comes in. But I want to make sure that we first get to two other matters, which are a description of the case that I am going to provide to the members of the venire and then also the content of the voir dire questions themselves.

I handed out to you in a previous conference my proposed voir dire questions. I am now going to read to you and hand out to you my proposed summary of the case, which differs from the version that I previously gave to you because of the defendants' concession that they are not objecting to the existence of a contract between the plaintiffs and the defendants with respect to the delivery of these warrants nor as to their failure to perform with respect to the delivery of the warrants. This revised version addresses those changes. I'll ask you if you have any comments on this now.

Mr. Daniels, would you hand these to the parties so they can follow along. I will read it out loud. Here is the proposed summary of the case.

"In this case, the parties agree that Clarex and Betax, plaintiffs, contracted with Natixis to buy a number of bonds issued by the Republic of Nigeria together with a number of warrants. The warrants entitled the holder to receive payments that fluctuated in amount based on the price of oil.

"Over the course of five separate transactions, Natixis sold 46 million in face value of Nigerian bonds to

plaintiffs. The parties agree that Natixis was also obligated to deliver a total of 46,000 Nigeria warrants to the plaintiffs. Natixis did not deliver those Nigerian warrants to the plaintiffs together with the Nigerian bonds. The plaintiffs claim that Natixis's failure to deliver the warrants caused Clarex and Betax to sustain damages.

"Natixis asserts two defenses. First, Natixis asserts that it was impossible for it to perform its obligations under the contract at the time because of adverse market conditions. Therefore, Natixis contends that its performance should be accused by what we call the doctrine of impossibility.

"Second, Natixis contends that one of the contracts at issue in this case, specifically, a February 8, 2000, transaction involving 5,000 Nigerian warrants, is barred by the statute of limitations, which generally requires that a lawsuit for breach of contract be brought within six years after the contract was breached.

"The plaintiffs contest that defense, asserting that the defendants acknowledged their debt to the plaintiffs attending the statute of limitations period."

I'll be reading this to the members of the venire. They won't have a written copy of it front of them. Would you like me to make any amendments or modifications to this summary? Mr. Levine?

MR. LEVINE: Yes, your Honor, we have a very strong

objection to the section extend, "The warrants entitled the holder to receive payments that fluctuated in amount based on the price of oil."

THE COURT: I'm happy to delete that sentence.

MR. LEVINE: Thank you.

THE COURT: Mr. Domb?

MR. DOMB: I think that in lieu of deleting it altogether, it might be fair to put in something neutral, like "The warrants entitled plaintiffs to certain rights about which you will hear evidence at trial," or something to that effect.

THE COURT: I think for purposes of what the venire is going to be hearing for purposes of listening to our questions, they don't need to hear those details. They will hear it more amply when evidence comes in.

Next, can I turn to the voir dire questions themselves. I'm hoping that you have, as I suggested at our last conference, few comments, in part because we have printed these out for the jurors. Still, I open the floor to any proposed changes or amendments.

MR. LEVINE: We have no objections.

THE COURT: Thank you, Mr. Levine.

MR. DOMB: We have nothing.

THE COURT: Thank you, Mr. Domb.

I'd be happy to take up now the question of the plaintiffs' proposed exhibits regarding which there was some

question and also the defendants' proposed exhibits as to which there is some question as described in the exchange of letters on May 21st and 22nd. Does either side have any other issues that you would like me to address before I turn to those matters?

MR. LEVINE: I have another issue, but we can do these first.

THE COURT: I'm happy to hear yours.

MR. LEVINE: I would request that the witnesses be asked to leave.

THE COURT: I think we already discussed the question of sequestering witnesses other than the experts for purposes of the proceedings. Unless there is an objection, I think I would prefer that to apply now as well.

MR. DOMB: OK. For clarification, that holds also during the opening statements?

THE COURT: Yes.

MR. DOMB: Let me ask those witnesses to leave.

THE COURT: Thank you.

MR. LEVINE: Your Honor, in light of your most recent rulings about what Mr. Shipway is permitted to testify about -- and specifically you said he can testify as to market conditions, market practices around the time of the breach, that's it, that's all he can testify about -- because his report contains nothing relating to those topics about which he

is permitted to testify, the rules prohibit him and the law prohibits him from testifying on those issues at all.

We have no problem with him testifying on what he thinks the account statements say. But on those particular issues that you limited him to testifying about -- putting aside that we don't think he is qualified to testify about it, that's not the point I'm making -- his report does not address it at all. The law is very clear: If it's not in the report and the report is not supplemented timely, you cannot testify.

THE COURT: Can I ask a practical question, Mr. Domb, before you respond. When would you be calling Mr. Shipway?

MR. DOMB: After the fact witnesses. Our fact witnesses are Ms. Sherman, Mr. Rolle, Mr. Fitting, Mr. Briggs, and then Mr. Shipway. I doubt that we will get to him until sometime late tomorrow at the earliest. And I do disagree with Mr. Levin's statement, if you would like now to address that.

THE COURT: Thank you. I think because we have the additional time and because this is the first time I have heard this argument, it provides both of you an opportunity to provide me with a short letter explaining your positions on the issue with respect to the scope of his testimony and the basis for excluding his testimony on issues that, if I take Mr. Levin's comments at face value, do not extend to issues that were covered in his expert report. I would like to ask both sides to provide me with a letter to explain their positions on

this issue before we begin court tomorrow.

MR. LEVINE: There is one other issue relating to Mr. Rolle. Your Honor has given plaintiffs more than enough time to show you a document that he is going to testify about. If they can't put it in front of you right this minute, he should be precluded.

THE COURT: I did want to talk about Mr. Rolle. As you know from our last conference, I was looking for the writing about which he was going to testify, the piece of paper. This goes in part to the original writing rule and now the question as to whether or not, assuming that the proposal is that Mr. Rolle testify as to the content of a writing, why it is that I shouldn't permit him to do that given the strictures of the best evidence rule and particularly F.R.E. 1004.

I think I have an obligation to make a determination as to whether or not those preconditions are in fact satisfied to the extent that the content of Mr. Rolle's testimony is to establish the existence and content of a writing which is not in front of the Court. Can I ask that you respond to that, please, Mr. Domb.

MR. DOMB: Yes, your Honor. The General Obligations Law requires acknowledgment in writing. I think for at least a couple of decades now writing includes electronic writings. An email that is not printed out is a writing. An email that

existed, was not printed out, and is no longer capable of being printed out nevertheless was a writing.

Even if you speak about a letter, a letter that existed, was read, the contents of which are remembered and testified to, and now the letter cannot be produced because it has been misplaced or destroyed or whatever, nevertheless is a writing.

I think when the Court hears Mr. Rolle testify, the Court and the jury will understand the nature of the writings that we are alleging. Whether it is a writing sufficient to satisfy the General Obligations Law is a fact issue for the jury.

THE COURT: I agree with that. But there is a gating matter. There is the question of Rule 1004, which constrains the admissibility of other evidence of content of writing. It reads, "An original is not required, and other evidence of the content of a writing, recording, or photograph is admissible if (a) all the originals are lost or destroyed and not by the proponent acting in good faith, (b) an original cannot be obtained by any available judicial process, (c) the party against whom the original would be offered had control of the original . . . (d) the writing, recording, or photograph is not closely related to a controlling issue."

I think, and I'll again ask for supplemental briefing on this if necessary, that it is incumbent on me to ensure that

these prerequisites under 1004 have been satisfied to the extent you seek to introduce verbal testimony regarding the content of a writing. I would need to actually see evidence, not constrained by the rules of evidence, in making that determination. I would need some evidence that these prerequisites under 1004 have been satisfied.

Again, I don't disagree with you that you can prove the content of a writing through other means, just that the rules of evidence require that these conditions be satisfied in order for that testimony to be admissible. In this case it is not clear to me that the originals are lost or destroyed or that an original could not have been obtained by an available judicial process, obviously not right now, but at some point during the proceedings up to the moment that we are about to begin trial.

MR. DOMB: Your Honor, Mr. Rolle explains why the original as it existed at the relevant times in this case is no longer capable of being printed out from the Euroclear computer. Your Honor has precluded us from putting in information past a certain date. But right now Natixis as well as our client could go to the Euroclear computer and print out the current version of it. I think under the Court's ruling that may be precluded.

So, what Mr. Rolle will testify is that a printout existed or could have been printed out at the relevant times

and this is what it contained. We do think that his testimony will explain and will fall under the conditions of Federal Rule of Evidence 1004 that you referred to.

THE COURT: I am going to have to ask that he not testify on that topic until I have seen supplemental argument on this. I'll take as a given that you, plaintiffs, cannot today simply press a button from the Euroclear screen and see what it showed at a prior date.

The question therefore for the Court will be whether or not 1004(b) actually requires that you have gone out to Euroclear and asked them whether or not the information that was available on the screen in those prior days could have been presented by them. I understand you could not press the button, but could you have issued a third party subpoena or requested documentary production of that document from Euroclear?

MR. DOMB: I think the record in this case shows that Euroclear could not do that. We have not subpoenaed Euroclear, to directly answer your question. But evidence, which will not come in because it post-dates August 21, 2007, evidence from Natixis's records and from our records shows that Natixis tried to find out the status of instructions that fell away. Euroclear had no information on that.

The information available to each side through Euroclear today is no different from the information available

to Euroclear, as I understand it. So we have a case where a document existed in electronic form that was capable of being printed out and, as I understand it, cannot be printed out today in the same form. But it did exist. That is really the basis of our argument.

THE COURT: In order to get through this gate of 1004, as I understand it, I'm not constrained by decisions regarding admissibility of evidence for purposes of these other issues. If there is evidence, information, that you want to convey to me to justify the introduction of this evidence under 1004, I'm open to it. If it results from information that is otherwise precluded from the case in chief, I'm open to that. I just need to make sure that I'm satisfying my gating obligations under the rules of evidence.

MR. LEVINE: First, your Honor's question was right on about getting it from Euroclear. Neither party, and this would have been the burden for the plaintiffs, asked the exact question your Honor asked about whether or not Euroclear can click it, print it out, accepted it. That was never asked. That should be said. So they fail on that point.

The other thing, let's remember what they want to put this in for. They want to say this is a direct communication from Natixis, however circuitous, a direct communication to Clarex and Betax. That means they got it. They are claiming they got it.

If they lost it, if they destroyed it, if they failed to print it out, that's not our fault. They knew in 2006 and 2007 that they didn't get the warrants back in 2000 and 2001. The burden was on them to keep that if it was relevant, if it mattered.

This idea that we are going to be cross-examining against a nonexistent document that we can't tell you what it is, no matter how detailed Mr. Rolle's testimony is -- who knows, maybe there is a disclaimer that says this is not intended to be a communication to third parties, only to the person on the other side of the computer?

Mr. Rolle worked for Scotiatrust, he did not work for Clarex, so we can't cross-examine him. They do not satisfy the evidentiary rule that your Honor is citing. Mr. Rolle should be precluded. They have had two years to show you that.

THE COURT: Thank you. I'm going to again take advantage of the fact that we are going to be running a relatively short day today to give you a chance to present whatever your best case is to me in writing regarding why it is that this testimony should be introduced, admitted, or precluded on this basis. If you can get me those before tomorrow morning, I will try to be in a position to rule on that question. Thank you.

There are a number of exhibits about which the parties were unable to agree. I should express my thanks again for the

fact that you are able to agree on as much as you have. I very much appreciate it.

Exhibit 15 from the plaintiffs' exhibits, could I ask first a question. Who is going to be authenticating this document? I recognize Mr. Fitting's name, but I didn't recognize the other people's names on this email chain.

MR. DOMB: Your Honor, one important thing about this exhibit that the middle email appears to be written by Robert Pivinski, but Mr. Fitting testified at his deposition that that was actually Mr. Fitting who wrote this. At that time Mr. Fitting had an issue with his email account and he was using Mr. Pivinski's email account. So those are the words of Mr. Fitting.

THE COURT: I have a question about authentication which I expect that you will establish. With respect to the question of whether or not this should be excluded on the basis that it is intended to introduce evidence of the post-2000-2001 valuation and post-2000-2001 damages, I'm not going to preclude introduction of this evidence. I'm accepting the plaintiffs' description that although these are later-dated documents, that they are intended to demonstrate the value of the warrants at the time of the transaction.

Exhibit 19. I appreciate the acknowledgment from the plaintiffs that this document is potentially barred by the motion in limine number 1. I did say that you would be

permitted to conduct a voir dire on this document regarding the time at which it was produced. I will allow you to do that before I make a final determination regarding its admissibility.

With respect to Exhibits 32 and 33, I'm going to skip those and go to 86 and 87, and address 32 and 33 together with Defendants' Exhibits K, L, and M. So 86 and 87.

Can I ask, Mr. Domb, 86 and 87 each contain a large volume of account statements. I take it from your letter that you are intending only to introduce some subset of these?

MR. DOMB: Yes, your Honor. Let me first preface by saying that yesterday, while going through that exhibit, we saw that in the printing process two page ranges were duplicated a total of three times within that. We took those out. It is easy to see because the exhibit really is a sequential number of Bates numbers P262 through P400-something. We removed that. The exhibit now is maybe two-thirds or half of that size.

The answer to your question is yes, the statements are all there. We intend to question witnesses on perhaps a couple before October of 2006 and one or two after. So we are talking about four or five exhibits.

The reason they are all there is, number one, there is no basis to exclude them and, number two, we want to show the continuity, that there was no change, that whatever was shown during the relevant period of 2006 through '07 is the same and

carries forward from what it was before.

THE COURT: Is it your intention not to introduce all of what is currently included as 86 and 87 but to have individual account statements --

MR. DOMB: Right. For example, we will ask witnesses to comment on the statement for May of 2002 and then for January or February of 2007, something like that.

THE COURT: Each of those would be marked separately 6A, 6B, instead of introducing the entire volume?

MR. DOMB: If that would make things easier, we could do that. We just felt uneasy. You might remember at one point in the case we were criticized for giving samples of statements and not putting in statements that the Court felt were the most relevant even though we had testimony that all of the statements were essentially the same.

Having seen no reason why they should be excluded, our first choice would be to include those exhibits as they are and question witnesses about a select few of them. If the Court feels that that is an issue, we could subnumber exhibits or particular statements 86A, B, etc., and use only those.

THE COURT: I would like to ask your comments, Mr. Levin. My principal concern with these was simply redundancy and taking up time of the jury. It doesn't sound as though Mr. Domb's proposed approach is actually going to consume much time. Given that, is there a basis for me to preclude him from

introducing the exhibits?

MR. LEVINE: Our view is, your Honor, that they should not be permitted to cherry-pick. We would think if some of them are going to come in, then we would want all of them to come in, because we want to show it's here, it's here, it's here, it's not disappearing and coming back, disappearing and coming back. I don't want to leave the jury with that misimpression.

THE COURT: All right. They can all come in, assuming of course that you are going to remove the duplicative Bates-stamped pages from the ones that go to the jury.

MR. DOMB: We sent the other side a PDF of the correct exhibit. Our courtroom technician has it, and we can give it to the Court in either paper or electronic form at your convenience.

THE COURT: Thank you very much. I would appreciate a paper copy of it. You can hand it to Mr. Daniels whenever you have a moment free.

With respect to Defendants' Exhibits K, L, and M -- tell you what. I did not interpret the power of attorney at K to be the extrinsic evidence of the content of the contract, the meaning of the contract. I have a general concern about the intended purpose of these exhibits as described, Mr. Domb, in your letter, namely, that they go to the question of whether or not the claim is actually time-barred with respect to these

warrants.

The reason why I raise that question is because my understanding is that they are time-barred absent an extension of under the General Obligations Law. My question is, by trying to demonstrate to the jury, introduce the argument perhaps, that they are not in fact time-barred, that we are pointing the jury toward an issue that is not actually a question in this case, because they are time-barred unless there is an extension. Would you mind addressing that.

MR. DOMB: First of all, we concede that without the General Obligations Law, these warrants, the claim on them would be time-barred. We sued long after six years. The tolling agreement I believe will come in. I think neither side objected. The tolling agreement clearly covers 41,000 warrants. What does this power of attorney add by showing that the power of attorney covers 41,000 warrants? Plus, Mr. Farah is not testifying.

The same thing goes for Exhibit L. There is a handwritten note that this tolling agreement doesn't cover the 5,000 warrants. That is evident on its face. This adds nothing. And Exhibit M is a handwritten note by Mr. Turnquest that includes the phrase "5,000 lost to tolling," which is again a statement that the tolling agreement doesn't have the 5,000 warrants.

In one of your pretrial rulings your Honor said that

there is no need for extrinsic evidence to interpret what the tolling agreement means or covers. We concede that but for the General Obligations Law, these claims would be covered. So none of this is at issue. For what purpose is it being offered? That is our position.

THE COURT: Mr. Levine.

MR. LEVINE: I'm here to tell you. Their claim is that under the General Obligations Law there is this either account statements or the invisible document Mr. Rolle wants to testify about. Somehow we have acknowledged an obligation that that extends the statute.

These documents are admissions that the account statements do not say what they claim they say. K, the power of attorney, it's very convenient, Mr. Fitting will be testifying, but Ms. Sherman signed the document and she will be testifying. This is not a tolling agreement. It's a document between Clarex and Betax on the one hand and Mr. Farah's company on the other hand to bring the case in 2009, October of 2009.

They say go sue on our claims and our claims are defined as 41,000 warrants. This is not interpreting a tolling agreement. It is an admission that they know that those account statements don't say what they claim they say.

(Continued on next page)

THE COURT: I accept your argument with respect to K.

MR. LEVINE: L. One of the arguments they want to make is -- and Mr. Domb makes it -- is if the client doesn't know, they don't know what their rights are. L is signed by Mr. O'Naghten, their lawyer. He knows what their rights are. It is an admission that their lawyer knows that these account statements don't say what they are trying to say they say.

THE COURT: Can I ask with respect to L, L is the tolling agreement itself?

MR. LEVINE: Yes. And it's signed by Mr. O'Naghten, the lawyer from Akerman.

THE COURT: And I think as Mr. Domb just said the expectation is that the tolling agreement itself would be introduced. So, is the purpose of L then simply to get in this --

MR. LEVINE: Sorry, I apologize, your Honor. I was confusing it with the other one. But M comes in. The handwriting, again it could have been written on a napkin.

THE COURT: Sorry. L.

MR. LEVINE: OK, Exhibit L. Is the fourth amended and restated tolling agreement.

THE COURT: Can you start by telling me -- so assuming the agreement itself were to come in, can you tell me is the purpose of this exhibit then to introduce simply the summary comments regarding the content of the agreement which are

included in the handwritten notes?

MR. LEVINE: Two purposes. One is that that handwritten note is an admission by the plaintiffs that they know the account statements don't claim what they say. And the second is the handwriting, this fourth amended and restated tolling agreement is signed by Mr. O'Naghten, Mr. Domb's partner. So when they make the claim that clients don't necessarily understand what their rights are, the lawyers do. The fact that he signs it and that the claims are 41,000, not 46,000, is an admission by their own lawyer that they know that the account statements don't say what they say.

THE COURT: Do we know whose handwriting this is?

MR. LEVINE: Yes, where it signs for Clarex and Betax -- oh, the signature handwriting I believe is Mr. Turnquest's.

THE COURT: The note on page 2.

MR. LEVINE: I believe that's Mr. Turnquest's.

THE COURT: It would have to be authenticated. It's not clear to me what the purpose of this Exhibit L is, to the extent we are just talking about not the agreement itself but the handwritten notes that are included in it. Am I focused on this correctly?

MR. LEVINE: There are two points to it. That's one of them. That's one of them. The first one is we want to introduce it to show that handwriting is an admission that they

know the account statements don't say what they claim they say.

THE COURT: Can I ask on that, why do we need to have a description of what it is that the agreement says in someone's handwriting as opposed to having the agreement speak for itself and the fact that those 5,000 warrants aren't covered by the agreement?

MR. LEVINE: Because it is still an admission. When someone says why isn't the 5,000 there, it's because the 5,000 -- it's an admission the 5,000 was lost to tolling. In other words, the account statements don't say what plaintiffs purportedly claim they say. And if they want to say that there is another way to interpret what that means, they're free to say that, but we are entitled to make the point that they are admitting that the account statements don't mean what they say they mean.

And then their fallback to that -- and that leads into my second point -- is what do the clients know? They don't know what their rights are. That's why this document is particularly important because of who signs it on behalf of Clarex and Betax. It is signed by Mr. O'Naghten, Mr. Domb's partner. He is not the client; he's the lawyer. And when the lawyer signs it, that's a statement that he knows that the account statements don't say what they purportedly claim they say.

If they want to argue it some other way, that Mr.

O'Naghten doesn't know what he is talking about, and it's just, you know, he doesn't know what their rights are, they are free to say that. They want to put Mr. O'Naghten on the stand to testify, go right ahead, but we are entitled to argue that by Mr. O'Naghten signing this fourth tolling agreement years after the 5,000 -- statute of limitation of the 5,000 warrants have expired, we are entitled to make the argument this is an admission not by just the client but by the lawyer on behalf of the client, who understands what their rights are and knows that the account statements don't say what they purport to say.

MR. DOMB: May I have a moment, your Honor?

THE COURT: Please.

MR. DOMB: Your Honor, what I did is confirm. I didn't know whether this was Mr. O'Naghten's signature, which he says it was. He was authorized by the client to sign on their behalf as a convenience.

I do still believe that the sole purpose that this is being offered for is to show that someone in a handwritten note -- by the way, I don't believe that is was Mr. Turnquest. We identified Mr. Turnquest's handwriting during depositions, which was much different. I believe the state of the record is no one knows whose handwriting this is. It's being offered to interpret what the agreement itself states.

THE COURT: Thank you. So to the extent that this is being offered to include this handwritten statement, which is a

note on the top of page 2 that says JP Morgan Chase 5,000 not covered by this tolling agreement, I believe that is extrinsic evidence that summarizes or interprets the meaning of the remainder of the agreement and, therefore, need not be included and should not be presented as evidence regarding the meaning of the contract.

I think there is a separate question as to whether or not the agreement itself without that handwritten note -- which I will also note seems not to be authenticated -- could be introduced is a separate question, and I am not seeing a basis right now to exclude the introduction of the agreement itself.

MR. DOMB: Without the handwritten note?

THE COURT: Correct.

MR. DOMB: OK.

MR. LEVINE: So, we can admit it.

THE COURT: If you have a copy of it without the handwritten note.

MR. LEVINE: We have it; we can redact it.

THE COURT: OK, redact it.

M, do we --

MR. LEVINE: Maybe plaintiffs have a clean copy.

THE COURT: I will let you work that out.

MR. DOMB: It has to be redacted.

THE COURT: In any case, we will redact it.

With respect to Defendant's Exhibit M, again do we --

this may have been said before -- is this clearly authenticated? Is this somebody who is going to be testifying here.

MR. LEVINE: Mr. Turnquest authenticated this at his deposition.

MR. DOMB: Yes, I agree with that. And we have objected to the reading of that portion of Mr. Turnquest's deposition that refers to this on the same basis that sometimes -- I don't think he could pin down the date. I think he said it was around 2008, maybe later, that in recapping his understanding of the situation he did write that note 5,000 lost to tolling for the obvious reason that the 5,000 were not included in the tolling agreement.

So, the tolling agreement is clear on its face. The fact that Mr. Turnquest was not a lawyer, was in the Bahamas, and was told that the 5,000 was not included in the tolling agreement, the fact that he wrote that as a note to himself is not probative of anything about the general obligations law and whether that revived the statute of limitations.

THE COURT: I don't interpret this to be extrinsic evidence of the meaning of the contract itself. I can understand why it would be the defendants would argue that this is relevant to the jury for them to interpret -- for them to have an understanding of how the plaintiffs reasonably understood the account statements that were being sent to them

by defendants, so I can't exclude this on the basis of relevance, and I don't believe that this is -- at least as put forth here -- a description of the meaning of -- sorry -- intended to be extrinsic evidence of the meaning of the contract itself.

So, with that, let me turn back to the plaintiffs two exhibits that I stepped over, which are 86 and 87 -- sorry, 32 and 33. Excuse me.

MR. LEVINE: Just a point of clarification. On the power of attorney, that is admitted in K.

THE COURT: Yes, K can be admitted. L can be admitted with the redaction we discussed, and M can be admitted.

MR. LEVINE: Thank you. If you are still working -- I believe they have also objected to KK.

THE COURT: Sure.

MR. LEVINE: Which is the --

THE COURT: JJ.

MR. LEVINE: Well, they objected to JJ as well and KK.

THE COURT: So JJ is the EMTA primer. I understand that Ms. Werner is going to be testifying.

MR. LEVINE: Yes, your Honor.

THE COURT: So I think that with respect to this I do think that it is hearsay. I would not exclude it on the basis simply that it is dated after the date of the events at issue. To the extent that it describes events that happened before the

date of publication, that I think would be something that my prior ruling would not strictly keep everything out. I think that to the extent there are particular provisions of this that spoke to that time, it would be valid.

My concern with respect to this is that it is hearsay. Ms. Werner is going to be here testifying as to exactly the same information and can give a more targeted description of it. Mr. Levine?

MR. LEVINE: Your Honor, I apologize, but I believe you're wrong.

THE COURT: OK, please tell me if you think I'm wrong.

MR. LEVINE: It would come in as --

THE COURT: Respectfully.

MR. LEVINE: It would come in both as a market report -- EMTA issues these on a regular basis. The markets follow them. This could come in under the Bloomberg exception, and your Honor is going to allow them to put in Exotix, and that we didn't think met this.

This squarely falls within the Bloomberg exception of 803(17). It comes in. It's also a business record. EMTA is a trade association. One of its principal obligations and responsibilities is to follow the markets, issue reports, alert their participants to developments in the market. And Ms. Werner drafted this document, she drafted it in the ordinary course of her business. They maintain the file. It is not

hearsay. It speaks to what caused the market-wide failure, something that EMTA does, that this is part of their responsibility, and this falls squarely within both the Bloomberg exception, and it comes in as a business record. It's simply not hearsay.

THE COURT: Can I pause you on the 803(17). 803(17) has an exception for market quotations, lists, directories or other compilations that are generally relied on by the public or by persons in particular occupations. Is this a market quotation, list, directory or other compilation?

MR. LEVINE: Yes, this is a compilation of market data that they put together to explain what caused the failure. They hear from the participants, they monitor the market, and then they publish these primers. This is why they exist. They set the rules, they set the standards. It was EMTA that came up with the protocol of trading the bonds with the warrants. It was EMTA that later came up in 2002 with the protocol separating the bonds from the warrants. The way they do it is by issuing these primers, and then the market responds to it. This is a market report, and it is a business record. This is what they do.

MR. DOMB: Well, number one, to call this primer -- which I hope you can look at in front of you, which is a three or four page textual description of something -- to call that a market quotation, list, directory or compilation under 803(17)

is just wrong. It doesn't fit in there.

Number two, it's not a business record. Mr. Levine makes it seem like this is something routine that's done all the time. As far as I could tell from the record, there was this primer which was the first one that Ms. Werner wrote, and then she updated it approximately four times, the last of which was in October or November of 2007. It is not maintained in the regular course of business. I happen to have gone into the EMTA website over the weekend to update my information on EMTA. They have a section on documents covering all sorts of government obligations: Argentina, Chile, Venezuela, probably 25 countries. I was surprised and interested to see that they no longer have a section on Nigeria. Perhaps the issue is over. It is not maintained in the ordinary course of business.

THE COURT: You are pointing me, Mr. Levine, to 803(6), is that right?

MR. DOMB: You mean the business records exception?

MR. LEVINE: Mr. Domb is simply wrong that it's not created in the ordinary course of business. This is what she does, these drafts, these primers. The fact that she may have drafted three or four on Nigeria doesn't mean that she doesn't draft countless number of primers throughout the year on a whole host of issues. That's what she does, she follows the market, and she issues these primers, and they give directives to the market, and the market follows them. They are the ones

who established these protocols. Their protocols is the reason we're here today.

THE COURT: Should I be looking at an exception other than 803(6)?

MR. LEVINE: 803(6), it would satisfy 803(6) as well.

THE COURT: And what else are you looking at? What other hearsay exception would you point me to?

MR. LEVINE: Well, because this would be within her normal occupation and within her normal zone of knowledge, she should be able to testify about the document. This document just reflects what is in her head. If you're not going to let the contents of the document in, are you going to preclude her from testifying about what happened in the market? Because all this is channeling what was in her mind, what she learned, and put it into the market. If you're not going to let the document in -- EMTA, they are the only ones on the planet who could tell you about the market-wide failure.

THE COURT: I'm not disagreeing with having her testify. It's the basis under 6.

MR. DOMB: Your Honor, (6)(a) says the record was made at or near the time. So stopping on that one, this is an October 2002.

MR. LEVINE: Precisely.

MR. DOMB: May I?

MR. LEVINE: Precisely. Because that's when they

learned about the failure.

THE COURT: Sorry. Please, each of you please take your turn. Mr. Domb, it's your turn right now.

MR. LEVINE: I apologize.

MR. DOMB: This is a document written in October of 2002, which Natixis wants to introduce to show what was the situation in February 2000 and in August and September 2001, which were the dates of breach.

If you continue with (6)(a), it was made at the time or from information transmitted by someone with knowledge. This document is double hearsay. Ms. Werner didn't go out in the field and find out what was going on. She put down what was reported to her. That will be evident when she testifies.

So, the document is double hearsay. And if you fit this within the business record exception, I think any document written by any corporation then could be deemed to be a business record. Because it was created, they made three versions of the document, ergo it's a business record?

THE COURT: Again, I'm going to take advantage of the fact that we have extra time to allow both of you to provide me with supplemental briefing on this question. I will ask it to be brief briefing.

But I agree with you, Mr. Domb, that the places where I was stalled, to the extent we are looking at 803(6) are both 803(6)(a) which asks that the record be made at or near the

time of the act, event, condition, opinion or diagnosis, also by the introduction to 803(6) itself, which is a record of an act, event, condition, opinion or diagnosis, and I would be interested in the parties' view as to whether or not the I will call it forward-looking, market-setting standards that EMTA is setting forth in the primer is an act, event, condition, opinion or diagnosis as described in introduction to that rule. In any case, we have an opportunity for you to put forth your best argument on that.

MR. LEVINE: Just one point. On the comment Mr. Domb made about "at the time," that's a good argument for us, because part of what we want to say is EMTA didn't learn about it until then. What she is writing about and what she learned at the time, she is writing it contemporaneously with that.

Part of our point is that not even EMTA learned about the fails until sometime in mid or late 2002. So if the entity -- the trading association whose job it is and the reasons for its existence is to monitor the market -- doesn't learn about the market-wide fail until a year after it occurs, how are we supposed to know? So the timing is critical. And she does draft it at or about the time she learns about it.

THE COURT: OK. And there is no question that she will have the opportunity to testify to that. I want to make sure I make the best possible decision on this. I will ask you for both short letters on this question. I assume we won't get

to the introduction of this document until defendant's case in chief and, therefore, unlike the other question which goes to testimony that the plaintiffs expect to introduce shortly, you need not get it to me by tomorrow morning but sometime before the defendant's case in chief. Thank you.

So, I have just been handed a noted saying that our jury panel is ready. So, unless the parties have other issues that we need to address now, I'd like to allow the members of the jury to enter the courtroom and for us to begin the voir dire process. We are going to take a short recess as the jurors come over, and I will call us back to order as soon as the jury panel reaches the courtroom. Thank you.

(Recess)

THE COURT: Sorry. This will just be a minute. One thing I wanted to do before we had the jury panel come in was just to remind you of the practice for jury selection, which I have already described to you. I have handed out a sheet describing it to you. We are using the struck panel method. Each side will have three peremptory challenges which will be exercised simultaneously. We will be putting 14 people in the jury box before we exercise the peremptory challenges. We will aim for a jury of eight, though, as I said in my written statement, I reserve my discretion whether to decide to impanel a larger jury if any peremptories overlap or are waived.

Typically in this courthouse court reporters are

excused for the voir dire process. And the reason why I wanted to come back in is to ask the parties if either of you has an objection to allowing our court reporter to take a break as we conduct the voir dire.

MR. DOMB: No objection, your Honor.

MR. LEVINE: Fine with us.

THE COURT: Thank you.

(Continued on next page)

A F T E R N O O N S E S S I O N

2:00 p.m.

(A jury of eight was selected and sworn)

(Jury present)

THE COURT: Thank you very much. Welcome back from lunch, ladies and gentlemen of the jury and counsel. Now I'm going to give you some preliminary instructions. Now the case is officially on trial. So, to begin with, you are here to administer justice in this case according to the law and to the evidence. You are to perform this task with complete fairness and impartiality and without bias, prejudice or sympathy for or against the plaintiffs or the defendants.

Now, let me explain the jobs that you and I are going to perform during the trial. I will decide what rules of law apply to the case. I will decide this by making legal rulings during the presentation of evidence, and also, as I told you, in giving final instructions to you after the evidence and the arguments are presented.

In order to do my job, I have to interrupt the proceedings from time to time to confer with the attorneys about rules of law that should apply here and, as I mentioned earlier, sometimes we will talk here at the bench outside of your hearing. But some of these conferences may take more time than others, so as a convenience to you I may excuse you from the courtroom. I will try to avoid those interruptions as much

as possible, but please be patient. The conferences are necessary to ensure the fairness of the trial as a whole, and will also, I certainly hope, have the effect of making the trial proceed faster.

While I decide the law that applies to this case, you, ladies and gentlemen of the jury, are the triers of fact. You are going to weigh the evidence presented and decide whether or not the plaintiffs have proved by a preponderance of the evidence that the defendants are liable to the plaintiffs.

You must pay close attention to all of the evidence presented, and you must base your decision only on the evidence in the case and my instructions on the law, which I will provide to you in more detail at the end of the evidence.

So, first off you are going to be evaluating the evidence. So, what is and what is not evidence? Evidence consists only of the testimony of witnesses, documents and other things that are admitted into evidence, or any facts that the lawyers have agreed on or stipulate to, or that I may instruct you to find.

Some of you probably have probably heard of circumstantial evidence and direct evidence. Direct evidence is direct proof of a fact, such as the testimony by a witness, an eye witness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. The word infer here, or the expression to draw an inference means

to find that a fact exists from proof of another fact. An inference is to be drawn only if it is a logical and reasonable thing to do and not by speculation or guesswork. So you can draw inferences that are logical or reasonable conclusions from other facts in evidence, but you shouldn't speculate or take guesses.

In deciding whether to draw an inference, you must look at and consider all of the facts in the light of reason, common sense and experience. Now, whether a given inference is or is not to be drawn is completely a matter for you. You are the jury, you are the triers of fact.

Circumstantial evidence does not necessarily prove less than direct evidence, nor does it necessarily prove more.

So here is an example to help you think about the difference between direct and circumstantial evidence. Assume when you came into the courthouse this morning the sun was shining and it was a nice day outdoors. It was. Also assume that the courtroom blinds were drawn and you could not look outside. Assume further as you are sitting here that somebody walked in with an umbrella that was dripping wet, and then a few moments later somebody else walked in with a raincoat that was also dripping wet. Now, because you couldn't look outside the courtroom and you could not see whether it was raining, you wouldn't have direct evidence of the fact that it was raining, but on the combination of facts I just asked you to assume it

would be reasonable and logical for you to conclude that it was raining. That's circumstantial evidence. That's all there is to it. You infer on the basis of reason, experience and common sense from one established fact the existence or nonexistence of some other fact.

I will give you further instructions on these issues regarding evidence as well as on other matters at the end of the case, but keep in mind that you are to consider all of the evidence at trial.

Some things though, just so you know, are not evidence and should not be considered by you. First, statements and questions by the lawyers, they're not evidence and should not be considered by you. Nor are statements that I make, or questions that I may ask of a witness to clarify testimony. Arguments by the lawyers are not evidence. What you hear from the witnesses' mouths and from the document and other things introduced into evidence, that's the evidence.

Second, objections to questions are not evidence. Lawyers have an obligation to their client to make objections when they believe that evidence offered is improper under the rules of evidence. You shouldn't be influenced by the objection, the fact that they've made it, or by my ruling on the question.

If an objection is sustained, so that one of the parties says objection and I said sustained, what you should do

is you should just ignore the question that was just asked as if it had not been asked, and also ignore any answer that may have been given. If it's overruled, so, objection, overruled, you can treat the answer like any other answer.

If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction. So, I will let you know if a piece of evidence is something that should be considered only for limited purposes.

Third, testimony that I have excluded or told you to disregard is not evidence, and you shouldn't consider it. I will let you know if there is a piece of evidence that you should disregard, and I will do that as clearly as possible.

Fourth -- and you can infer this from what I said earlier -- anything that you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the basis of the evidence that's presented here in the courtroom.

So, in deciding the facts of this case you will have to decide the credibility of the witnesses, that is, how truthful you think they are, and how credible they are. There is no formula to evaluate evidence. That's why we have all of you members of our community here to decide. For now, let me just say that you bring into this courtroom all of your experiences, and all of your common sense, all of the background of your lives. Don't leave that common sense

outside the door, outside the courtroom.

The same types of tests that you would use to evaluate the credibility of a person that you were interacting with in your daily life are the kinds of tests of credibility that we ask you to bring to the evaluation of the witnesses and the evidence that is going to be presented to you here. The evidence doesn't require you to accept all of the evidence that's admitted at trial.

In determining what evidence to accept, you have to make your own evaluation of the testimony from each of the witnesses and evaluate them, evaluate the witnesses and the exhibits that are received into evidence.

As I said earlier though, it's essential that you keep an open mind regarding the case and the outcome until you have heard all of the evidence. By the nature of our process a case can only be presented step by step, witness by witness, and as you know from experience you can hear one person describe their side of the story independently, and based on their version of the story alone you think that it's completely right, and then you hear the other side tell their side of the story and you have second thoughts or you think that that second story may be right. So, what I want to ask you to do is to keep an open mind, not make up your minds until after both sides have presented all of their evidence.

There may be another side to any witness's story, so

wait and listen to cross-examination and the full testimony with respect to any particular witness.

So, you should use your common sense and good judgment to evaluate each witness's testimony based on all of the circumstances. Again, keep an open mind until the trial is over. You shouldn't reach any conclusions until you have all the evidence before you.

So, I asked many of you, all of you, whether or not you had served on a jury, whether you served on a criminal or a civil case. This is a civil case. And you may have heard of the concept of beyond a reasonable doubt as a standard of proof. That's the standard of proof in a criminal case, and it does not apply here. In civil cases the burden is different, and it's called proof by a preponderance of the evidence.

The plaintiffs have a burden of proving their claim by a preponderance of the evidence, and the defendants have the burden of proving their affirmative defenses by a preponderance of the evidence. The balance shifts depending on the nature of the claim. This means the party with the burden of proof must prove that their set of facts are more likely true than not true.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses and documents. It's you who will judge those facts, and you

will weigh them based on your own evaluation of the testimony that's put in front of you, and the exhibits. This means that the party with the burden of proof has to produce evidence that considered in light of all of the facts leads you to believe that what the plaintiff claims is more likely true than not, or that the defendant's claims are more likely true than not.

To put it differently, imagine you were reviewing one of the plaintiff's claims, for example. If you are to put the evidence that supported the claims on one side of the scale, and evidence that supported the defendant's on the other side of the scale, the plaintiffs would have to make the scales tip somewhat in his favor, or their favor, to prove their claims by a preponderance of the evidence. If the plaintiff fails to do that with respect to such a claim, it has not met its burden, and your verdict on the plaintiff's claims must be for the defendants.

I will instruct you further on the burden of proof after all the evidence has been received, but that scales metaphor is frequently very useful for preponderance of the evidence.

So, let me remind you about certain rules and principles regarding your conduct as jurors in this case.

First, as I said to you earlier, you must not talk to each other about this case or about anyone who has anything to do with it until the end of the case when you go to the jury

room to decide the verdict. I recognize that can be difficult, but please just hold all of that commentary until you get into the jury room after the case is closed to have conversations about the substance of the case and anything about the case. The reason for this requirement is that you must not reach any conclusion on the claims or defenses until all of the evidence is in.

As I have said, keep an open mind until you start your deliberations at the close of the case.

Second, do not communicate with anybody else about this case or with anyone who has anything to do with it until the trial has ended and you have been discharged as jurors. Anyone else in this case, in case you are curious, includes family members and friends. Again, I recognize that's really hard, but you can tell your family and friends that you are a juror in a civil case, but please don't tell them anything else about it until you have been discharged by me. If you would like, you can tell them that I have ordered you not to discuss it with them.

Similarly, I said this earlier, but no communicating about the case includes any means of communication including Facebook, Twitter, other websites and the like.

Third, don't let anybody talk to you about the case or anyone who has anything to do with it. If anybody tries to communicate with you about the case at any time through the

trial either in the courthouse or outside of it, please report it immediately to my deputy Mr. Daniels and no one else. When I say report that communication to no one else, I mean you shouldn't tell anyone including your fellow jurors. Just come to Mr. Daniels and tell him privately. You don't need to do it in open court. We will address it separately.

So to minimize the probability of any such improper communication, it's important that you go straight to the jury room when you come in in the morning, the room right back there, and that you remain in the jury room for the duration of the trial day. You should use the bathrooms in the jury room rather than using the other ones on the floor. You shouldn't use the cafeteria downstairs. I will be providing lunch for you. But part of the reason why you shouldn't do that is because the lawyers and other people involved in the case may be down using the cafeteria.

You shouldn't use public phones or cell phones on this floor. And given that the breaks will be short and that we want to keep ourselves moving as efficiently as possible, to the extent you can please try to stay in the jury room, that way we will all be on time.

Fourth, don't do any research or investigation about the case or anyone involved in it on your own. Don't go and visit any of the places that are described in the trial. Don't read or listen to or watch any news reports about the case, if

there happen to be any. Don't go on the Internet or use any kind of digital communications or other communications device in order to see what you can learn to inform yourself about this.

It's hard, but it's because -- I can't say it too many times -- your decision in this case has to be based on the evidence that's presented to you here. All that you need to know will be presented to you here by very capable counsel on both sides of the case.

If any of your fellow jurors violate any of these rules, please again don't hesitate to let my deputy Mr. Daniels know about it, and we will address it appropriately.

Also, can you please let me know through Mr. Daniels if any person that you know happens to come into the courtroom. It's a public trial, and anybody can come in here if they want to. You may see different people coming in over the course of the trial. It's a public and open courtroom. If you see anybody that you know that does come into the courtroom, make sure that you do not hear from them anything that may have happened in the court while the jury wasn't present. You shouldn't communicate with them at all, but certainly you shouldn't communicate with them about things that happened while you're not here.

If you see a friend or relative come into the court, please send me a note again through Mr. Daniels.

Now, finally, I have heard that some of you may be interested in taking notes. I will ask my deputy to provide to any of you who may be interested a pad of paper and a pen. Let me just give you a couple of thoughts about notes if you choose to take notes.

First, you can see we have a court reporter. Everything that I and the parties and the witnesses say will be transcribed by the court reporter, so there is going to be a record of everything that's said. And you are going to have the right when you retire to deliberations to request any portion of the transcript to be read back to you should you like.

So, if you take notes, first, begin writing on the second page of your legal pad. Put your juror number on the first page of the pad so that we can be sure that only you will be making and reviewing the notes on that pad. Do so only in those pads. Don't take your pads and your notes home with you; leave them in the jury room. They will be safe there. And leave them there during our lunch breaks as well.

You don't have to take notes. It's a memory aid. If you want to, you are welcome to, but any notes that you take, remember, are for your use only, to aid your own recollection. Your memory controls.

If you do take notes, be careful to not get so involved in taking notes that you stop paying attention to the

witnesses or the exhibits. That's something that I might do, but don't fall into that trap.

Once you are in deliberations, if there is a disagreement between one juror's notes and another juror's notes, or between one juror's notes and another juror's recollection, you can ask the court reporter to read back the relevant testimony, or to have the portion of the transcript sent to you, because ultimately it's the official court transcript that controls, not any individual juror's notes, so they shouldn't be a substitute for the actual text of what was said on the record.

So, during the course of the trial exhibits will be received into evidence. You have probably seen all of that on TV shows. You will see it happen here. The exhibits will be marked with an exhibit number. If there is an exhibit that you are particularly interested in when you go back into deliberations, and you are interested in seeing it, you can write down the exhibit number, or if you don't remember the exhibit number, describe it in a note to the court, and we can have it sent back to you so that you can review it during deliberations.

I expect to provide you with a list of all of the witnesses who have testified at trial at the end of the case, together with a list of all the exhibits that have been received into evidence so that can you use those to remind

yourselves what you may want to ask for.

So, we are now going to begin the trial. Sorry for the long introduction. Let me say one thing too. If any of you from this side of the jury box, if you'd like to reorganize after I'm finished, before we begin opening statements, I will ask my deputy to help you reorganize if you would like to be closer to the witness box. If you are comfortable where you are, that's fine, but I will give you a brief moment to think about that.

So I told you during the earlier part of the process we are going to begin hearing testimony every day at 9:30 a.m. We are going to continue to approximately 2:30 or three, including breaks. We are going to proceed today, Wednesday, Thursday, Friday of this week, and we will start again next week on Monday, to the extent that's necessary. Please be on time. Please try to arrive in the jury room no later than 9:15 a.m. If any of you are late, we cannot start until all of you are here, and all of us have to wait until you are here. If we lose ten, 20 minutes a day, we may not be able to get this trial completed as quickly as we might otherwise.

So, let me tell you how the trial is going to be conducted and tell you what we're going to be doing, you, the lawyers from both sides and me.

So, at the end of the trial I will give you more detailed instructions, and those instructions will control your

deliberations in this case, but let me just simply explain sort of the order of how the trial is going to proceed.

The first step in the trial are opening statements. First the plaintiff's attorney will make an opening statement, which is simply an outline to help you understand the evidence as it's presented. The opening statement itself is not evidence; it's a statement of what each side expects the evidence to show. Its purpose is to help you understand what the evidence will be and what the plaintiffs or the defendants are trying to prove.

After the plaintiffs have made their opening statement, the defendants will make their opening statement. At that point in the trial, after the opening statements, there will be no evidence. No one has introduced any evidence because all that you will have heard is arguments from the lawyers or statements from the lawyers, which are not themselves evidence.

After opening statements, the plaintiffs will present their evidence. The plaintiffs' evidence will consist of testimony of witnesses as well as documents and exhibits. The plaintiffs' lawyer will examine the witnesses, and then the defendants' lawyer may cross-examine them.

Following the plaintiffs' case, the defendants may present a case. Counsel for the plaintiff will have an opportunity to cross-examine any witnesses testifying for the

defendants. After the presentation of evidence is completed, the attorneys will deliver their closing arguments to summarize and interpret the evidence. Just as lawyers' opening statements are not evidence, their closing arguments are not evidence either.

After the closing arguments happen, I'm going to instruct you on the law. Then you will retire from here to deliberate on your verdict. Your verdict has to be unanimous. All eight of you have to be unanimous, and the verdict must be based on the evidence that's presented at the trial and based on my statement of the law as I give it to you.

Your deliberations will be secret. You don't need to explain your verdict to anyone. And that's the basic outline of the process.

So, with all of that introduction, we are going to begin the initial stage of the case, which as I said to you is opening statements. We are going to begin with the plaintiffs. So at this time I'm going to ask all of you to give your undivided attention to the lawyers as they make their opening statements.

Mr. Domb, before you begin, can I ask Mr. Daniels, would you like to see if the jurors would like to reorganize themselves in the box.

Thank you. Mr. Domb.

MR. DOMB: Thank you, your Honor. Good afternoon,

members of the jury. First I want to echo what Judge Woods has already told you earlier, that we thank you for serving as jurors in this case. It is a big imposition on your time. I'm sure some if not all of you would rather be elsewhere doing other things. This is a way that for many years we have settled disputes in this country, and so we thank you for your service. We will do our best, our team, to present the case to you as efficiently and clearly as possible so you may render a just verdict.

As your Honor said, the purpose of this opening is simply to give you a road map. This is not going to be long, maybe 20, 30 minutes tops. So, my purpose will be to give you a road map, tell you what the elements in dispute are, what is not in dispute, discuss a little bit the issues that are in dispute, and tell you the witnesses that we intend to call.

Let me start with who are the parties. The plaintiffs, our clients are two corporations, Clarex Limited and Betax Limited. We call them Clarex and Betax for short. They are incorporated, one in the Cayman Islands and one in the Bahamas. They are investment companies. They don't manufacture things, they don't provide services; their whole purpose is to invest funds on behalf of the owners of those corporations. Those companies are owned ultimately by a wealthy family in Latin America.

The companies are managed by professionals at a bank

called the Bank of Nova Scotia Bahama Limited. We called them Scotiatrust for short. So the professionals at Scotiatrust are the actual directors and officers of our clients who carry out the functions of our client under instructions from other people who manage the investments of these companies.

(Continued on next page)

Who is on the other side? Natixis. We call them "Natixis" for short. You have heard several names under which they were known. For many years they were known as Arnhold Bleichroeder. Although there are several parties, as his Honor I think explained to you, they are really all one and the same, because those other names are prior names by which the company was known. Now Natixis is the company. They are here in New York. They are ultimately owned by a large French bank.

So those are the parties. What happened and why are we here? Our clients were long-time customers of Natixis and they invested in various securities, investments. A lot of them were foreign government bonds.

If you will put up Exhibit 45, page 2, please.

The particular investments in this case that we are going to talk about were Nigerian government bonds. The board here on the left, which I think may also be visible on your monitors, is Exhibit 45, page 2. For context I'm showing you the investments that were made in the Nigerian bonds. Our client started investing by buying Nigerian bonds from Natixis in contractual arrangements, buyer and seller. Our client was the buyer, Natixis was the seller. The bonds were issued by Nigeria at the end of 1991.

Beginning in 1992 and going to 2001, a period of about ten years, our clients -- this listing, by the way, shows Clarex, Betax. This is one or the other. There is one other

company here called Agem, not involved in this case. It was a related company, but no claims are being made by Agem.

These are the face amounts of the bonds that our clients bought in the middle column. The M stands for thousands, or three zeros. To take an example, the first listing is six thousand thousand, $6 million face value. You can see these are all millions. The total was $197 million face value of bonds. Take away the 9 million that Agem, the uninvolved company, bought, you get $188 million face value of bonds.

I should say that that sounds like a lot of money, and it is. The bonds did not sell at the full face value of them. They tended to sell at a discount, as is common with foreign government bonds. At the point at issue in this case, which is towards the end of this period, they were selling at approximately 60 cents on the dollar. For example, a million dollars of face value would cost about $600,000. Still a lot of money. You remember, I said our clients are a wealthy familiarly. They did invest. This is one of the investments they did.

All of these transactions, this shows the bonds. Throughout this period if an investor bought a bond, the investor had the right to receive a warrant for no extra cost. It came with the bond.

What is a warrant? A warrant is a document, it's an

instrument, that describes the rights that the warrant holder had. As you will hear in testimony, the rights that were given by this warrant had to do with the right to receive payment at future dates if the price of oil -- Nigeria is an oil producer. If the price of oil in the market, the type of oil that Nigeria produces, rose above a certain threshold, then Nigeria would make payments to the holders of those warrants.

When were they going to look at the price of oil? Twice a year until the year 2020. The transactions at issue in this case happened one in the 2000 and four in the year 2001. The problem with the transactions in this case is that although for most of the earlier transactions, for all of the earlier transactions, Natixis properly delivered the bonds and the warrants that came with them for five transactions, five transactions at issues are detailed in this graph, Natixis did not deliver the warrants.

This is the trade date.

THE COURT: Mr. Domb, can you identify what you are pointing at.

MR. DOMB: Would you put that up on the screen, the table of five transactions, please.

On that table the date on the left should match the date over here in the overall table. These are the amounts of bonds and warrants. The bonds were delivered, the warrants were not. A total of 46,000 warrants were not delivered by

Natixis. Out of the $188 million in bonds, which corresponded to 188,000 warrants, our clients did not receive 46,000 warrants.

You are going to hear several times from Natixis's counsel and witnesses that our clients didn't pay for the warrants. In a sense that's true. I told you before, when you buy the warrants, you are entitled to get the warrants. When you buy the bonds, I'm sorry, you are entitled to get the warrants that came with it.

In preparing this case over many months, I thought of an analogy that has helped me understand it. Why should we recover for something that we didn't pay for? It's very simple. A person walks down the street and there is a clothing store selling --

THE COURT: I'm sorry. Can you restrain yourself to the evidence. We will have closing argument at closing argument.

MR. DOMB: Yes, your Honor.

There is no dispute in this case, as I believe your Honor said in the very opening instructions, that these were contracts for the purchase and sale of bonds with warrants. There is no dispute that Natixis did not deliver the 46,000 warrants that it was contractually required to deliver.

So why are we here? There are three main issues for you, the jury, to decide. I'll list those issues, and then

I'll speak for a few minutes about each of them.

Issue number one: Is the first of these transactions barred by the statute of limitations? The other four, it is agreed that they are not barred. But Natixis claims that the first one is barred.

Number two: Was it, quote, impossible for Natixis to deliver all 46,000 warrants? They are relying on something called the doctrine of impossibility. That's part of New York law. The Court, your Honor, will instruct you on what that means.

What I say, of course, is subject to your Honor's instructions, but my understanding is that in order to prove that it was impossible to deliver those warrants in a way that would excuse their not performing, Natixis has to show to you, has to prove, that it was objectively impossible for them to deliver the warrants. Not that it was difficult, not that it was really, really difficult, not that it would have cost them a lot of money, but that it was truly objectively impossible. And Natixis has the burden of proving that, that tipping of the scales that your Honor spoke about. That's impossibility.

Let me get back to the statute of limitations. As you can see, this transaction happened in February of 2000. The dates on the right side are simply the settlement dates. When you make a securities transaction, the contract is made on a certain date and the delivering payment is supposed to happen

three business days later. That's what happens. If it's not exactly three business days later, it means a weekend intervened.

These transactions all happened 13 or so years ago or more. The statute of limitations is 6 years. Why aren't they all barred? Well, as I told you, the last four transactions are not barred by limitations, because in 2007, before the 6-year period for these 2001 transactions expired, the parties entered into a tolling agreement, an agreement that stopped the running of that 6-year period because they tried to work things out. That agreement was extended I think 13 times until the year 2012, when we sued. So there is no bar as to these four.

As to the first one, more than 6 years did pass because this first transaction was not covered by that tolling agreement. By the time the parties made the tolling agreement in 2007, it was already more than 6 years after the first transaction. Natixis told our clients, and our clients believed that that transaction was barred by the 6-year limitations.

But there is a law in New York, the General Obligations Law, that says that if a debtor, in this case Natixis, who owned the warrants, acknowledges that obligation in writing to the creditor, to our clients who are owed the warrants, that restarts the 6-year period.

We will show you evidence during the trial,

principally through monthly account statements that Natixis sent to our clients, including the warrants at issue here in the portfolio of those statements, that that was an acknowledgment in writing, and therefore there is no statutory bar.

Those are the two issues that I mentioned, statute of limitations and impossibility. There is a third important issue for you, and that is: What were these warrants worth? That is our client's damages. They lost the opportunity to have these 46,000 warrants.

The law says that the damages, if you believe that we are entitled to recover damages, is the value of those warrants on each of the contractual settlement dates. So, for the 5,000 warrants, what is the value as of this date, February 11, 2000, and so on.

How do you value these warrants? They are not on some stock exchange, like the New York Stock Exchange or NASDAQ. You can't go into a store or look them up on the Internet. You can't go into Bloomberg and say what were these worth. The cash or funds that the warrant holder would receive depended on future events. No one knew.

The main future event was the price of oil. What was the price of oil in the market going to do? Was it going to go up? Was it going to go down? Was it going to stay the same? And if it would change, how? So it's a valuation issue. That

is the third thing for you to decide.

There are very smart people out there, smarter than me, who value these things. This is their profession and what they do for a living. They teach it. Each side will call an expert witness, a very smart person. I think both are Ph.Ds in economics. They will give you their opinions based on the work that they did on this case on valuing these warrants.

Although both of these gentlemen are extremely smart and good at what they do, surprise, they come up with very different valuations. You will see that Natixis's expert, Dr. Okongwu, has valued all the 46,000 warrants at about $300,000. Our expert, Professor Sundaram, who teaches at the NYU Stern School, values them at about $5.5 million. That will be the main issue, in effect, for you the jury to decide.

Who are we going to call as part of our case? We are going to start with Iris Sherman, who was one of these professionals at Scotiatrust in the Bahamas who acted for our clients. A lot of what she will say will be background and not in dispute. But I think the jury is entitled to see the background of these transactions and how the ones that are at issue, which happened here towards the end of the period -- by the way, they are not the very last five. They started on February 8th. They are five transactions that happened somewhere in the last eight or nine or so.

We may or may not, depending on what we cover with Ms.

Sherman, we may call a second gentleman from Scotiatrust, whose name is Perry Rolle.

After that, we will call two Natixis people, Sam Fitting who for something like 25 years I think was the main person at Natixis who dealt with these two clients. These were his two main clients. He dealt with these transactions. And we are going to call Daniel Briggs, who is an operations and compliance person from Natixis, who Natixis told us is their designated witness, too, who has knowledge of some of the issues in the case.

After that, we will call an expert witness in the securities industry, someone who knows the customs and practices of how securities work for some of the issues that are involved here, Mr. Shipway, who is actually in the courtroom, the gentleman in the front row there. After that, we will call Professor Sundaram on valuation. Natixis will call its own witnesses, and I will let Natixis's counsel tell you who they will be.

That is my roadmap of what we expect to prove. Thank you again for your attention.

THE COURT: Thank you, Mr. Domb.

Mr. Levine.

MR. LEVINE: Thank you, your Honor. Good afternoon. Ladies and gentlemen of the jury, good afternoon. Thank you for your service. My name is Eric Levine. I have the honor of

representing Natixis.

This case is very simple. This case is about something for nothing. This case is about getting millions of dollars for something for which they paid absolutely nothing. This case is about getting millions of dollars from a defendant who, through no fault of their own, could not deliver the warrants.

We don't dispute that they were supposed to get the warrants. But, as I will discuss in more detail, it was the result of a marketwide failure wholly unrelated to anything Natixis did that resulted in Natixis's inability to deliver the warrants. Simply put, there were no warrants to deliver.

What is this case not about? Clarex and Betax is not some elderly couple that was cheated out of its life savings by a big bad bank. Clarex is an investment vehicle for an enormously wealthy family. I'm going to refer to this family as the owners.

Let's be clear. The owners are Clarex and Betax. These aren't some people living off in a cloud who have no role in this. They are involved in every aspect of this case. They own the companies, they set them up, they direct what securities they buy. They fund the entities, they realize the profits when there are profits, and they incur the losses when there are losses.

Let's also understand the trading here: In Nigerian

bonds alone, $188 million of face value bonds from 1992 to 2001. In fact, in a given month, and you will see these account statements, in one month these owners traded almost $200 million in face value of sovereign debt obligations, one month.

What is a sovereign debt obligation? It's when a government lends you money. It is like a U.S. savings bond, except these are countries that really don't have the same chance of recovery, of paying the bonds. They are much more risky investments.

Let's be clear on who the plaintiffs are. This litigation is being brought on behalf of the owners. They are directing that it be brought. They are Clarex and Betax.

You know what is interesting? Do you know who Mr. Domb didn't mention as to witnesses? The owners. You won't hear from any of them. You will never hear them. You will never see them. You will never meet them. Why not? Ask yourselves throughout this case as you hear about their role --

THE COURT: Mr. Levine, would you please restrain yourself to the evidence that is going to be presented during the trial. You can make argument at closing arguments.

MR. LEVINE: You won't hear from them even though it was their decision to purchase the bonds. They determined how many bonds they would buy, they determined how much they would pay.

The owners' failure to appear is in sharp contrast to Natixis. The bank is not just brick and mortar, it is made up of people. It is an institution of people who do their jobs. You will meet them. You will meet Sam Fitting. You will meet Dan Briggs. They will tell their stories. You will have a chance to test their credibility.

They are going to tell you that they placed trades correctly every single time from 1992 to 2001. They will the tell you that all the value is in the bonds and that the warrants had literally no value in 2000 and 2001. They will tell you that they couldn't get the warrants, because it was out of their control. You will be able to test and judge their credibility. You will see them. You won't see the owners, but you will see them.

Specifically, one of the people you're going to see is a fellow by the name of Sam Fitting. Mr. Fitting, here is a perfect example, dealt directly with the owners. The owners placed the orders with him. He made the recommendations. He's going to tell you that when he made the recommendations, all the value was in the bonds and that the warrants were virtually worthless if not completely worthless. That testimony throughout this entire case will be unrefuted. There will not be a single witness that is going to disagree with that. That is going to be the fact of the case from the beginning until the end.

They will parachute in an expert to try to explain why the warrants had value, but that expert is going to have to ignore the facts. And the undisputed fact that Sam Fitting will tell you is that when he recommended these securities, all the value was in the bonds, there was no value in the securities. The owners will not show up to refute that.

Sam is going to tell you why these bonds had value. He is going to explain it to you. When you have $1 million of face value of bonds, you are entitled to 6.25 percent interest a year on that million dollars. But you only paid a percentage of the face value of the bond.

For instance, if you hear someone saying that they paid 65 percent of par, par is the million dollars and you pay 65 percent of that, $650,000, the investor makes $62,000 on a $650,000 investment a year. That is .96 percent. Let me say that again. It's 9.6 percent, almost 10 percent. 9.6 percent, almost 10 percent.

The warrants, on the other hand, were extraordinarily risky. They had to be in the money at the time. For the warrants to be in the money, certain conditions had to be met, and in 2000 and 2001 it was anyone's guess if they would ever be. They had no value. All the value was in the bonds.

It also depended in large part on the ability of Nigeria to pay. It doesn't help that Nigeria was a significant credit risk. The Nigerian bonds themselves were part of what

they call a category of Brady bonds. Brady bonds were created in the late 1990s and 2000s specifically because countries defaulted on their debt, so they had to restructure their debt and they had to come up with new bonds and new debt securities. These are all part of those Brady bonds. Understand that these bonds are in play specifically because countries like Nigeria defaulted in the first instance.

Let's talk about the structure of the transactions. There were five:

February 28, 2000, 5,000 warrants for Clarex;

August 22, 2001, supposed to be 16 warrants for Clarex;

August 28, 2001, 7,000 warrants for Betax;

September 5, 2001, 10,000 warrants for Clarex; and

September 10, 2001, 8,000 warrants for Clarex, for a total of 46,000 warrants.

For every $1 million of bonds that you purchased, face value of bonds that you purchased for whatever discount you got, you were entitled to get 1,000 warrants. If you have $5 million face value of bonds, you have 5,000 warrants, you're entitled to get 5,000 warrants. If you had $16 million face value of bonds, you're entitled to get 16,000 warrants.

However, all the consideration, every single penny, was paid for the bonds, not a penny for the warrants. The plaintiffs are going to admit this. All the documentation that

you are going to see is going to show this. And all that consideration was paid for the bonds even if the warrants weren't delivered. That's because the owners were buying the bonds. That's where the value was. They didn't count on the value of the warrants for anything. The bonds had all the value.

This is confirmed by Clarex and Betax's own accounting firm, Deloitte & Touche. Their financial statements will reflect that while the bonds had millions and millions of dollars of value, the warrants had none. They were ascribed no value. You're going to see those documents.

Let's talk about the mechanics of the transactions, because this is very important. As I said before, when you bought $1 million face value of bonds at whatever discount it was, you were entitled to get a thousand warrants. But it is not technically so easy. It's not a matter of here is $650,000, give me a million bonds and a thousand warrants. You have to issue instructions.

You are going to hear about a company called Euroclear and you are going to hear about a concept called a riskless principal. Natixis was a riskless principal. What does that mean? It means it did not have any warrants in its own inventory --

THE COURT: Mr. Levine, I'm going to ask you to refrain from this line at this time.

MR. LEVINE: Natixis did not have any warrants in its inventory. It had to go out and buy them. It didn't have any bonds in its inventory. It had to go out and buy them. What it would do was it would buy the bonds and the warrants from a third party, a counterparty, and then turn around simultaneously and sell it to Clarex and Betax. These were virtually simultaneous.

In order to do this, you have to issue instructions. Natixis would issue instructions to a company called Euroclear. They were the clearing agent. The clearing agent is the company that matches up the sell order and the buy order so they know who is getting what. Natixis would issue its buy order with its counterparties, its counterparties would issue the sell order.

There were two orders that they had to give. It was not one order. You must give a separate order for the bonds and you must give a separate order for the warrants because they are two separate securities. They may trade together by this protocol, this rule, but they are two separate securities. So you have to issue two sets of instructions.

If you issue one set of instructions and you just say deliver me bonds with warrants, the trades won't settle. Settle means they have cleared, the transaction has been completed. If you issue just one set of instructions, they won't settle. You have to send two sets of instructions.

On the flip side of the transaction, once Natixis gets the bonds and the warrants and it turns around and it sells them to Clarex and Betax, it issues two sets of instructions, one to sell the bonds and one to sell the warrants.

Clarex and Betax, on the other side of the transaction, they issue two buy instructions, one to buy the bonds and one to buy the warrants. You have to do them both correctly. If you don't do them both correctly, the trades won't clear.

Natixis did it right every single time. From 1991 through 2001 every single time they did it right, every single time. That includes the transactions where the warrants were not delivered.

Why, why, if they did it right, were the warrants not delivered? This comes back to the impossibility and the technicalities of how you trade these securities. There were many people in the market that didn't know how or didn't, for whatever reason, enter the trades correctly.

Over time, the warrants began to disappear because people would enter trades just for the bonds, single trade, not issuing two sets of instructions, so bonds would be delivered and then the warrants were not delivered. Eventually, over time, there were no warrants to deliver. Someone would get the bonds but they would not get the warrants. As this snowballed over time, there were no warrants to find. It was impossible

to deliver.

This protocol, these rules of trading, were set up by a company called the Emerging Markets Trading Association. You're going to hear from the general counsel. She is going to tell you that there were no warrants to deliver. She is going to tell you about this marketwide failure.

Obviously, Natixis did this for a fee. They were paid money. They were paid a markup. It should come as no surprise to anyone that Natixis was paid a fee for their services. You may hear accusations that they didn't disclose the commission -- the markup. But for 1992 to 2001 Clarex and Betax continued to do business buying bonds and warrants and other securities from Natixis because they wanted the bonds, and they knew they were paying a markup.

Let's talk about the issue of foreseeability. That's one of the elements impossibility. Was it foreseeable for Natixis to know that there was going to be a marketwide failure? The answer to that is absolutely not. These trades are settled. Hundreds of millions of dollars worth of trades had settled for eight years without a problem.

In February of 2000 there was one trade that didn't fail. On the same day that the warrants weren't delivered, there was another trade that exact same day for 5,000 warrants that were delivered. There were three more trades over the course of 2000 into 2001 where the bonds and the warrants were

delivered.

Then, in August of 2001, a year and a half later, there was a second transaction that failed. The bonds were delivered but the warrants weren't. But there was a series of successful transactions within a couple of weeks, and Natixis was not on any notice that this was foreseeable at all. Who could foresee a marketwide failure that a company, Emerging Markets Trading Association, whose job it is to monitor the market, also didn't see coming?

What is very interesting about the arrangement between Natixis and Clarex and Betax is they had what they called a DVP agreement, a delivery versus payment agreement. That agreement provided that when the securities you ordered were delivered, when the securities you bought were delivered, you pay.

When Natixis delivered the bonds, in every single instance Clarex and Betax paid the full amount. That includes the transactions were the warrants were not delivered. Why is that? Because the value was in the bonds. They bought the bonds. They paid nothing for the warrants. It was all about the bonds.

I want to refer to the statute of limitations argument for a moment. There is no question that the 6-year statute of limitations has expired on the 5,000 warrants from February 2000. Plaintiffs are going to try to, through an expert witness, demonstrate to you through the account statements that

there was some written acknowledgment of an ongoing obligation. Let me tell you right now, not even they believe that. Not even they believe that. Their witness is not going to stand up. Not even they believe that. This is something they have concocted in the last minute to try and maximize the recovery.

Finally, I ask you to do a few things for me. The first is constantly ask yourself, where are the owners? The second is that after plaintiffs put in their case, please keep an open mind and let us put in ours. Lastly, on the same note, after a witness testifies, wait until after I have cross-examined until you reach a final conclusion about their credibility.

Thank you.

THE COURT: Thank you, Mr. Levine.

Ladies and gentlemen of the jury, I promised you that what I am going to try to do for you for each of the days of trial is to get you out of here by 3 o'clock every afternoon. It is a little after 3:00 right now. What I am going to do is end your day today with you all having heard both of the parties' opening statements. Tomorrow morning I would like to ask you to come to the jury room by 9:15 a.m. We are going to start testimony at 9:30 and we will run through the day as I described.

Let me remind you again that you should not discuss the case, don't do any Internet or other research about the

case, don't discuss it with anyone. And please continue to keep an open mind about everything until you have heard the evidence. Also remember that at this point in the process you have heard no evidence. What the lawyers say is not evidence. Keep an open mind until you begin to hear the evidence. That will happen tomorrow morning promptly at 9:30.

Thank you very much.

(Jury not present)

THE COURT: Parties, have a seat. We are going to have an opportunity to meet again tomorrow morning. Mr. Levine, the line of argument that the jury should infer from the absence of the owners, something adverse about their case, is something that I am not sure I can permit.

I'm not asking for them to speculate about why it is that a particular person has or has not appeared here or that they have or have not testified. I don't know how I can legitimately expect them to draw an inference, an adverse inference, regarding the plaintiffs' case as a result of the fact that someone is not appearing in this proceeding, particularly given Judge Engelmayer's ruling on this issue before me.

I'm very strongly considering some kind of a limiting instruction for the jurors to make it clear to them that they are not to draw an inference from something that is not happening here in court, but rather they are to consider the

evidence that is put before them.

I didn't interrupt you during your opening, because it sounds as though that was a principal focus of it. How can I allow the jury to base their decision on the absence of testimony, the absence of evidence, in this case the absence of the owners?

MR. LEVINE: I am not asking you to give them an instruction to draw an adverse inference. That is the first thing. The first thing is I'm not asking the Court to give an adverse inference instruction.

But I think I am entitled to ask the jury to consider, to draw inferences, not just from what they hear but also from what they don't hear. When Sam Fitting gets up there and testifies that he spoke directly to the owners, they are the ones who bought it, he made the recommendations based on the bonds, he made the recommendations not at all based on the warrants, I should be entitled to argue to them that the only people that can refute that testimony is the owners, but they didn't show up.

I want to be able to argue they didn't show up because if they showed up and they testified, they would have to tell you what Sam Fitting said was right, they would have to tell you that what Sam Fitting said about the value of the bonds is right and the value of the warrants is right.

Why can't I make that argument? We can draw that

inference from their failure to appear. These aren't people out in the ether. We have established that. I should not be punished because these people decide not to show up. The fact that their names are expunged from the record is one thing. But to prevent me from making the argument or to make it sound as if these people have no role and I can't ask them to infer something from people who are so central to these transactions, I'm sorry, your Honor, I think that's just plain wrong. I should be entitled to tell the jury to think about it. Normal people would think if you're the client, if you're the one placing these orders, if you're the one running the show, show up and testify. I should be able to tell them to them.

THE COURT: Can I ask a question before you stand up, Mr. Domb. If the point is essentially that the testimony that we will hear from Mr. Fitting is uncontroverted, then that testimony is uncontroverted. The fact that it is uncontroverted is uncontroverted.

MR. LEVINE: Right.

THE COURT: Why, then, if that's the case, is it necessary to say not only that it is uncontroverted, which of course completely supports your case, but also that they, the jury, should look in an adverse manner at the absence of evidence that would, might, make that truth more uncontroverted? If it is true, it's true. If there is a lack

of evidence that it is false, that doesn't mean it's less true.

MR. LEVINE: That may be so. But if the only people that can controvert the evidence don't show up, I should be able to point out to them that they didn't show up so that I could also argue that had they shown up, they would tell you that the warrants had no value, they would tell you that they only cared about the bonds.

It goes to the issue of valuation. It goes to the core of the case, which is the valuation. What these people were buying and cared about were the bonds, not the warrants. This is what makes me so frustrated, your Honor, because these are the decision-makers.

THE COURT: Part of this for me is that this is a case that has a long history and this issue of the owners has driven a lot of conversations between the parties and the Court. That past history I think of as some costs. I'm thinking of from where we are now and the case that we are presenting to the jury, regardless of whether or not the case might have developed differently up to this point, we are now where we are. The owners have a very limited role in the case as it has ultimately been developed.

I understand your position, which is that the decisions didn't always run in your favor as to whether or not the beneficial owners would take a larger role in these proceedings. The fact that that has not come to develop in a

way that you might have preferred, though, I'm not sure that that leads in to be such a significant issue as you might want to present to the jury.

MR. LEVINE: Then they can stand up and say ignore it. They can stand up and say it's not a big issue. One of the issues for your Honor, and I really feel strongly about it, is how many times will they be able to make a misrepresentation to the Court about the role of the owners and not only get away with it but we get punished. There have been multiple proven misrepresentations both to the Judge Engelmayer and yourself. We should not be punished. We should be given a little extra leeway on this, if anything.

THE COURT: This is my point about the costs. This issue, there is a lot of history to it and a lot of baggage. I understand that you feel strongly about it. At the same time, I'm not sure that that should lead me to allow you to make arguments to the jury that are very much driven by the frustration that you feel from the inability to --

MR. LEVINE: I appreciate that, your Honor. But that's not what's driving it. What is driving it is this case at the end of the day is a valuation case. If I'm able to demonstrate that the plaintiffs believe that these warrants had no value, I should be permitted to put on my case.

One of the ways I can demonstrate that these plaintiffs believe that the warrants had no value is by saying

that the individuals who negotiated the transaction with Sam Fitting never bothered to show up. They didn't show up because they would have told you that the warrants had no value.

I am entitled to make that argument. If they think that it doesn't show that, then they can in their closing statement make whatever argument they want to say it's irrelevant that the owners didn't show up. Our case will be irreparably harmed if you were to issue an instruction.

THE COURT: Thank you, Mr. Levine.

Mr. Domb.

MR. DOMB: I have several points, your Honor. The first, a general point, is that what Mr. Levine is showing for the fourth or fifth time in this case is that he doesn't want to follow the Court's prior instructions. We saw not just that example but two or three other examples in opening where I feel Mr. Levine crossed the line. Like a pit bull who won't let go of something, they continued to grab on to this issue and introduce it improperly.

Second, why the plaintiffs bought these warrants is not an issue in this case. They bought the warrants, they were not delivered, there is a valuation issue. Mr. Fitting is not going to be able to -- I don't know what he will say, but what may have motivated the purchases in 1992, '94, '95 is not necessarily relevant to why they bought warrants in 2000 and 2001.

If Natixis is to be allowed to say through Mr. Fitting that the owners, plaintiffs to call them more broadly, felt there was no value to the warrants, then we should be able to have Mr. Fitting say what he recommended to the owners or plaintiffs in 2007, when Nigeria was offering $220 a warrant and Mr. Fitting said no, that's not enough, the warrants are worth more than that. If they were worth more than that then, we can ask the jury to infer that they were worth more years earlier, before many of the potential payment dates had passed yet.

So yes, we are upset about the focus that Mr. Levine put on his opening statement. I didn't want to stand up and object, but we do think that it would be appropriate for the Court to give an instruction to the jury that the absence of the owners here, nothing is to be inferred from it.

THE COURT: The other issue, Mr. Levine, that I captured where Mr. Domb did stand up was on the issue of riskless principal and the question of whether or not there are obligations on the part of Natixis or rights, contractual or otherwise, that exist outside the scope of the contract.

MR. LEVINE: My understanding is that we all agreed that we were a riskless principal as long as we said we are a principal. That's what we said. As long as we said we are a principal, there was no issue.

THE COURT: A principal. I think the idea of a

riskless principal connotes riskless. I think the idea that you are buying and selling these securities in a transaction, I think you used the word "commission" a couple of times by accident, that is clearly established. I think what Mr. Domb was concerned about and what concerned me at that point in the argument was the addition of the word "riskless."

MR. LEVINE: Then I misunderstood your Honor's direction. I thought that was a hundred percent clear as long as we are weren't running away from the concept of principal or riskless principal and we weren't saying we were brokers, that that was the issue. I thought I was being consistent with your Honor's direction.

MR. DOMB: Your Honor, I remind you that on that very issue we said that if they are going to argue some nuance of difference between riskless principal and principal, Mr. Shipway should explain that a riskless principal transaction avoids risk as to price but it does not avoid risk as to delivery or payment. That's a critical concept.

THE COURT: Correct. The basis of this issue was in essence that Natixis's obligations with respect to these transactions are what they are in the contract. What I am trying to avoid is argument that is intended to imply absence or existence of obligations or duties other than those.

As Mr. Domb points out, this came up before in the context of whether or not we would have additional testimony

regarding the scope of particular obligations or duties under securities practice outside of the agreement itself. I think our decision was to make it clear if the obligations of Natixis are those that are under the agreement and that we weren't characterizing them as --

MR. LEVINE: My understanding was that as long as we said principal and since Mr. Shipway, everyone, agreed that there was no difference between the obligations of a riskless principal and a principal, as long as we stayed with principal, we used the word "principal," we were OK.

THE COURT: Agreed. Use the word "principal," not the word "riskless."

MR. LEVINE: I agree. Since the obligations were the same, I meant it generically, your Honor.

THE COURT: I appreciate that. We are on the same page. The issue that caused me the concern was the "riskless." I agree that we thought you could use the word "principal."

MR. DOMB: Do I understand now, your Honor, that the witnesses are not going to be prompted to say that Natixis acted as a quote riskless principal?

MR. LEVINE: The word "riskless" will never be used again.

THE COURT: Thank you very much. That was my concern.

I am going to take under consideration your point, Mr. Levine, about the inference here. I am completely sympathetic.

I understand the long history of this owner issue in the development of this case. I'm concerned, however, about asking the jurors to infer that the owners would or would not say something were they to be called here.

I'm going to think about it over the course of the evening and as the trial develops. I hope that from here on we will be hearing evidence up until the point that you give your argument. As the evidence develops, I'll be considering this issue. If I think I need to make a limiting instruction before closing arguments or discuss it with you further, I'll raise it at the close of evidence.

Is there anything else that we should address?

MR. LEVINE: Unless you want to do the exhibits.

THE COURT: Are we essentially done with the exhibits?

MR. DOMB: I'm not aware of anything. We have to give you some letters by tomorrow morning.

THE COURT: Right. KK.

MR. LEVINE: Yes, which is the delivery versus payment agreement, which is the agreement between Clarex and Betax and Natixis providing that when the securities are delivered, that's what I referred to in my opening, when securities are delivered, payment is made.

For some reason that we can't comprehend, the plaintiffs are objecting on the basis of relevance. That is the document that dictates when payment is made, so I can't

quite understand the objection.

THE COURT: Let's do this later. I assume this is not coming in today.

MR. LEVINE: I'm going to use it with Ms. Sherman. She signed it.

THE COURT: All right, let's take it up now. What is the objection to this?

MR. DOMB: Your Honor, relevance. Frankly, I have no idea, although we have asked, what point or what use Natixis intends to make of this agreement. I have read it over four or five times. I can't grasp, and even as Mr. Levine spoke about it in his opening I couldn't grasp, what they are trying to prove with this.

MR. LEVINE: First of all, paragraph 2 talks about payment when the securities are delivered. I am going to prove, I am going to argue, that when the securities you order, the securities you buy, are delivered, you pay, and each time that the bonds were delivered, they paid. So they weren't buying the warrants. They traded as one to create a transaction, but they were two separate securities, so they paid nothing.

This is one of the account-opening statements that Natixis signs with Clarex and Betax. What is the possible objection, particularly since this is the document that governs the payments of the transactions at issue?

THE COURT: I actually don't see a relevance objection to this document. I would allow you to introduce it. Mr. Levine, we have established that there is a contract, that there is performance by plaintiff, there is failure to performance by defendant, in other words, an agreement and breach. Does this and the fact that the plaintiffs, in your words, paid zero for the warrants go to damages? Is that what you understand?

MR. LEVINE: Yes, it goes to the damages. The fact that you pay nothing for something indicates what its value is. When they pay everything for the bonds and nothing for the warrants, that is an indicia that these things are worthless. It is not being put in for the purpose of saying there is no consideration.

THE COURT: Thank you. That's my question. I don't have an objection to introducing this if the sole objection is relevance.

MR. DOMB: I still think it is irrelevant because there are five or six other places or maybe a dozen places. We concede that we paid zero for the warrants and there was a separate transaction for each set of warrants. The amount due from our client was zero. We paid it by definition. I don't see what this adds.

THE COURT: I won't exclude it solely on the basis that it may potentially be cumulative, and I don't see a basis

to exclude it on the basis of relevance. So I will allow its introduction.

Is there anything else before I adjourn?

MR. DOMB: Just logistically, your Honor. I assume we may leave our materials in this courtroom without having to carry them back and forth?

THE COURT: Very good question. I hope that the answer to that is yes. Mr. Daniels, will we be locking up the courtroom every night?

THE CLERK: Yes.

THE COURT: We will be locking this up. Everything should be safe. I will look forward to seeing all of you here at 9:00 again. My hope is, as already expressed, that to the extent there is any evidentiary issue that you would like to discuss before we begin testimony, that you raise it with me then. I expect that we won't have any, but if there is, I'll come in in the morning to address it.

Thank you very much. We are adjourned.

(Adjourned to 9:00 a.m., May 28, 2014)